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COMMENTS OF
THE ERISA INDUSTRY COMMITTEE

PROPOSED AMENDMENTS TO THE REGULATIONS ON THE DISCLOSURE OF RELATIVE VALUE OF OPTIONAL FORMS OF BENEFIT

April 28, 2005

The ERISA Industry Committee ("ERIC")[1] is pleased to submit the following comments on the proposed amendments to the regulations regarding the content requirements that apply to explanations of qualified joint and survivor annuities ("QJSAs") and qualified preretirement survivor annuities ("QPSAs"). The regulations require, among other things, disclosure of the relative value of optional forms of benefit that are payable in lieu of a QJSA. The proposed amendments were published in the January 28, 2005, issue of the Federal Register. 70 Fed. Reg. 4,058. The preamble to the proposed regulations states that comments on the proposed regulations must be submitted by April 28, 2005.

ERIC submitted written comments on the relative value regulations that were originally proposed in October of 2002. After the regulations were finalized in December of 2003, ERIC submitted a written request that the Treasury Department postpone the effective date of the regulations. ERIC appreciates the

[1] ERIC is a nonprofit association committed to the advancement of the employee retirement, health, incentive, and compensation plans of America's major employers. ERIC's members provide comprehensive benefits to tens of millions of active and retired workers and their families and beneficiaries. ERIC's members' plans are the benchmarks against which industry, third-party providers, consultants, and policy makers measure the design and effectiveness of employee benefit, incentive, and compensation plans. ERIC's members are engaged daily with meeting the demands of both their enterprise and the needs of employees while dealing with an increasingly complex web of benefit and compensation laws. ERIC, therefore, is vitally concerned with proposals affecting its members' ability to provide employee benefits, incentive, and compensation plans, their costs and effectiveness, and the role of those plans in the American economy.

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consideration that the Treasury Department and the Internal Revenue Service[2] have given to ERIC's prior submissions.

I. Background

The relative value regulations are intended to assure that, before they elect the form in which they will receive their benefits under a pension plan, the plan's participants receive a meaningful comparison of the relative economic values of the plan's optional forms of benefit (the optional methods of distribution that the plan offers for the payment of benefits, such as a single life annuity, a joint and survivor annuity, and a lump sum). The regulations were issued to address concerns that, in some cases, the information provided to participants under prior law did not enable the participants to compare the plan's optional forms of benefit adequately without professional advice. As the preamble to the proposed amendments explains,

> "In particular, participants who are eligible for early retirement benefits in the form of both subsidized annuity distributions and unsubsidized single-sum distributions may be receiving explanations that do not adequately disclose the value of the subsidy that is foregone if the single-sum distribution is elected. In such a case, merely disclosing the amount of the single-sum distribution and the amount of the annuity payments would not adequately enable a participant to make an informed comparison of the relative values of those distribution forms. The 2003 regulations address this problem, as well as the problem of disclosure in other cases where there are significant differences in value among optional forms, and also clarify the rules regarding the disclosure of the financial effect of benefit payments." 70 Fed. Reg. 4059.

Although ERIC supports the general objective of the regulations, ERIC is deeply concerned about several aspects of both the proposed amendments to the regulations and the regulations themselves. ERIC's concerns stem from the application of the regulations to the wide array of benefit options offered by major employers' plans, which typically include:

- **Numerous optional forms of benefit:** For example, one of ERIC's members maintains a plan with over 40 benefit options. Others maintain plans with countless joint and survivor annuity options: each participant is permitted to designate the percentage of the participant's annuity that is payable to the survivor annuitant (in increments of 1%). Many plans also offer a social security level-income option that provides an income stream that is coordinated with the participant's expected social security benefit to

[2] In the interest of simplicity, we refer to the Treasury Department and the Internal Revenue Service collectively as the "Treasury" in this letter.

provide an approximately level stream of income over the course of the participant's retirement. When the participant reaches social security retirement age, the amount of the annuity decreases by no more than the amount of the participant's expected social security retirement benefit.

- **Numerous sets of actuarial assumptions:** Plans must use statutory assumptions for lump-sum distributions, but they generally use different assumptions for other benefit options and often use alternative sets of assumptions for many options (applying whichever set of assumptions yields the greatest benefit for the participant).
- **Grandfathered benefit options and benefit options based on grandfathered mortality and interest rate assumptions:** Many plans include grandfathered benefit options and grandfathered mortality and interest rate assumptions -- often as a result of mergers and acquisitions and plan amendments that occurred in the past.
- **Bifurcated benefit options**: Under some plans, one portion of a participant's accrued benefit (for example, the benefit accrued before a specified date) is subject to one array of benefit options, while another portion of the participant's accrued benefit (the portion accrued on or after the specified date) is subject to a different array of options.
- **Combined benefit options:** Some plans allow participants to combine alternative benefit options. For example, some plans allow a participant to elect a joint and survivor option either with or without a term certain or social security level-income feature. Other plans allow a participant to receive only part of the participant's benefit in a lump sum and require the remainder to be received as an annuity.
- **Complex options:** Some plans offer joint and survivor annuities either with or without a "pop-up" feature (under which the benefit amount "pops up" if the survivor annuitant predeceases the participant). Some plans offer early retirement supplements that, in some cases, affect the optional forms of distribution that are available under the plan.

In addition, as we shall explain, ERIC is concerned that the proposed amendments to the regulations address one issue (the application of Internal Revenue Code § 417(e) to social security level-income options) that exceeds the bounds of the disclosure issue that is the subject of the regulations, and that the proposed amendments do so in a way that is contrary to both the text of the statute and its legislative history, inconsistent with other regulations, and contrary to sound pension policy. The position taken by the proposed amendments -- that § 417(e) applies to social security level-income options -- will impose significant new financial obligations on pension plans, increase the unfunded liabilities of the Pension Benefit Guaranty Corporation, and discourage plan sponsors from offering social security level-income forms.

ERIC is also concerned that the Internal Revenue Service will interpret the relative value regulations to require plans to furnish participants with information that is voluminous, detailed, and confusing. Furnishing this information will be counterproductive: instead of informing or helping plan participants, the information will overwhelm and confuse them.

Regulations that subject plans to substantial unanticipated liabilities and that require plans to furnish participants with a large volume of confusing information will provide yet another reason for employers to reduce or end their participation in the voluntary pension system. The Treasury should not issue regulations that have this effect.

II. Summary of Comments

1. The Treasury should revise the regulations to make it clear that Internal Revenue Code § 417(e) does not apply to social security level-income options.

2. If, contrary to ERIC's recommendation, the Treasury is inclined to expand the distribution options covered by § 417(e) to include social security level-income options, the Treasury should first address this issue in a separate rulemaking in which the Treasury thoroughly and systematically considers the scope of § 417(e).

3. The Treasury should revise Treas. Reg. § 1.417(a)(3)-1(c)(1) to make it clear that, in the case of an annuity with a retroactive annuity starting date ("RASD"), the required participant-specific information may be determined as of the applicable RASD rather than as of a current date.

4. The Treasury should revise Treas. Reg. § 1.417(a)(3)-1(c)(2)(iii)(C) to make it clear that "all options" refers to all of the optional forms of benefit with an actuarial present value that meets the regulations' requirements and not to every optional form offered by the plan.

5. The Treasury should make it clear that where a plan makes available one set of optional forms of benefit for one portion of a participant's accrued benefit (*e.g.*, benefits accrued before a specified date) and a different set of optional forms of benefit for the remainder of the participant's accrued benefit (*e.g.*, benefits accrued on and after the specified date), the plan may disclose the financial effects and relative values of the optional forms separately for each portion of the participant's accrued benefit.

6. The Treasury should make it clear that where a plan permits a participant to elect different annuity starting dates for different portions of the participant's accrued benefit, and the participant is permitted to elect a different form of benefit for each portion of the participant's accrued benefit, the plan may disclose the financial effects and relative values separately for each portion of the participant's accrued benefit for which the participant is permitted to elect a separate annuity starting date.

III. Comments

1. The Treasury should revise the regulations to make it clear that Code § 417(e) does not apply to social security level-income options.

Treas. Reg. § 1.417(a)(3)-1 requires a plan to disclose to participants the financial effect and relative value of optional forms of benefit available under the plan. The final regulations, which were adopted on December 13, 2003, were generally effective for qualified joint and survivor annuity explanations provided with respect to annuity starting dates occurring on or after October 1, 2004.

In Announcement 2004-58, the Treasury announced a delay in the regulations' effective date, except with respect to optional forms subject to Code § 417(e). A parenthetical phrase in the Announcement listed "single sums, distributions in the form of partial single sums in combination with annuities, or installment payment options" as examples of the optional forms of benefit that are subject to § 417(e).

The proposed regulations modify the effective date of Treas. Reg. § 1.417(a)(3)-1 to make the effective date consistent with Announcement 2004-58. Like the Announcement, the proposed regulations include a parenthetical phrase that identifies examples of optional forms of benefit that are subject to § 417(e). However, the proposed regulations include a new item that was not listed in Announcement 2004-58: social security level-income options. Prop. Reg. § 1.417(a)(3)-1(f)(2)(i).

As we shall explain, expanding the class of distribution options covered by § 417(e) to include social security level-income options is contrary to both the text and legislative history of the statute, inconsistent with other regulations, and contrary to sound pension policy.

Section 417(e) imposes requirements that a plan must meet when the plan "immediately distribute[s]" the "present value" of a participant's qualified joint and survivor annuity. Section 417(e)(3) requires the present value of such an immediate distribution to be no less than it would be if it were calculated using a specified mortality table and interest rate.

A related, but different, requirement applies under § 411(a)(11) when a plan "immediately distribute[s]" a participant's nonforfeitable accrued benefit. Under § 411(a)(11), if the present value of a participant's nonforfeitable accrued benefit exceeds $5,000, the participant's nonforfeitable accrued benefit may not be "immediately distributed" without the participant's consent. For purposes of determining whether the $5,000 standard has been met, the plan must calculate the present value of the participant's nonforfeitable accrued benefit in accordance with § 417(e)(3). Unlike § 417(e), however, § 411(a)(11) applies if the plan makes an immediate distribution of a participant's nonforfeitable accrued benefit in any form and regardless of whether the distribution represents the "present value" of the participant's nonforfeitable accrued benefit.

The text of § 417(e) makes it evident that § 417(e) governs an "immediate distribution" of the "present value" of a participant's benefit, *i.e.*, a distribution in the form of a lump sum.[3] By contrast, a social security level-income option does not provide for the "immediate distribution" of the "present value" of a participant's benefit. A social security level-income option provides an income stream that is coordinated with the participant's expected social security benefit to provide an aggregate income stream that is approximately level over the course of the participant's retirement. The social security level-income option is usually provided in the form of an annuity for the life of the participant (and, in some cases, also for the life of the participant's surviving spouse or other beneficiary).

When the participant reaches social security retirement age, the amount of the annuity decreases by no more than the amount of the participant's expected social security retirement benefit. In practice, a social security level-income option generally results in substantial payments throughout the participant's lifetime, including the period after the participant attains social security retirement age.

Although it is possible for a participant to receive all or most of the value of the benefit before reaching social security retirement age, this is not a common result. For example, a study conducted regarding one large defined benefit plan found that 61% of the participants who elected a social security level-income option received a monthly payment after social security retirement age that exceeded 50% of the monthly payment received before that age and that only 2% of the participants who elected a social security level-income option received a monthly payment after social security retirement age that was less than 10% of the monthly payment received before that age. Because the social security

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[3] Courts have frequently observed that the purpose of Code § 417(e) (and the parallel ERISA provision) is to regulate the valuation of lump-sum payments. *See, e.g., Pension Benefit Guar. Corp. v. Wilson N. Jones Mem'l Hosp.*, 374 F.3d 362, 367 (5th Cir. 2004) ("§ 417(e) [is] the statute which controls the valuation of lump sum plan benefit payments"); *Esden v. Bank of Boston*, 229 F.3d 154, 164 n.13 (2d Cir. 2000) (1994 amendments to § 417(e) "added a statutory requirement that the Secretary prescribe an 'applicable mortality table' for converting annuities into lump-sums"); *Laurenzano v. Blue Cross & Blue Shield of Mass., Inc. Retirement Income Trust*, 134 F. Supp.2d 189, 202 (D. Mass. 2001) ("ERISA § 205(g) allows the plan to provide a lump sum that is the present value of the qualified joint and survivor annuity"); *Eaton v. Onan Corp.*, 117 F. Supp. 2d 812, 841 (S.D. Ind. 2000) ("205(g)(3) . . . sets forth specific rules for determining the present value of any accrued benefit for purposes of a lump sum distribution"); *Flo-Con Sys., Inc. v. Pension Benefit Guar. Corp.*, 39 F. Supp. 2d 995, 999 (C.D. Ill. 1998) ("The Retirement Equity Act, among other things, set a ceiling on interest rates that plans can use to value lump sum distributions by incorporating the rates that PBGC uses to value benefits as the maximum permissible rates."); *Kiefer v. Ceridian Corp.*, 976 F. Supp. 829, 833 (D. Minn. 1997) ("Section 417(e) of the Internal Revenue Code governs the interest rates plans can use to calculate lump sum benefits.").

level-income option is typically paid over the life of the participant, it is not an "immediate distribution" of the "present value" of the participant's benefit.[4]

The legislative history of § 417(e) and its predecessors supports the view that § 417(e) does not apply to a social security level-income option. The committee reports repeatedly use such terms and phrases as "cash-outs," "lump sums," "single sum distributions," and "immediately distribute the present value" to refer to what the statute covers.[5]

The conclusion that § 417(e) does not apply to social security level-income options is consistent with the Treasury's conclusions regarding non-decreasing annuities and social security supplements. The Treasury has concluded that § 417(e)(3) applies to every optional form of benefit, with the exception of certain specified forms. Treas. Reg. §§ 1.411(a)-11(a)(1), 1.417(e)-1(d)(1). Two of the excepted forms of benefit are a non-decreasing annuity and an annuity that decreases solely because of the cessation of a social security supplement. Treas. Reg. § 1.417(e)-1(d)(6). A social security level-income option bears a much closer resemblance to these two forms of benefit than to an "immediate distribution" of the "present value" of the benefit.

Other regulations recognize that social security level-income options are more like non-decreasing annuities and social security supplements than lump sums. It would be inconsistent with those regulations for the Treasury to treat a social security level-income option in the same manner as a lump sum, rather than as an annuity, for purposes of the valuation provisions of § 417(e).

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[4] It is understandable that, in order to prevent evasion of § 417(e)(3), the Treasury would consider applying § 417(e)(3) to a form of distribution that is not a lump sum but that approximates a lump sum -- on the ground that a plan should not be able to avoid complying with § 417(e)(3) merely by fragmenting a lump sum into a few payments made over a short period of time. Unlike a few installment payments, however, a social security level-income option is not a vehicle for the evasion of § 417(e)(3); it is a recognized and well-established form of distribution that is designed to provide a level retirement income over the lifetime of the recipient.

[5] *See, e.g.*, H.R. Rep. No. 1280, 93d Cong., 2d Sess. 272 (1974) ("A plan may provide for the 'cash out' of an employee's accrued benefit. In other words, the plan may pay out, in a lump sum, the entire value of an employee's vested accrued benefit"); S. Rep. No. 575, 98th Cong., 2d Sess. 3, 16, 23-24 (1984) ("cash out" and "immediately distribute the present value"); H.R. Rep. No. 655 (Pt. 1), 98th Cong., 2d Sess. 43 (1984) ("cash out"); *Id.* (Pt. 2) at 3, 15 ("cash out" and "immediately distribute the present value"); H.R. Rep. No. 841, 99th Cong., 2d Sess. II-487 (1986) ("cash-out"); S. Rep. No. 412, 103d Cong., 2d Sess. 192 (1994) ("single sum distributions" and "cash-out"); H.R. Rep. No. 826, 103d Cong., 2d Sess. 224-25 (1994) ("single sum distributions" and "cash-out"); H.R. Rep. No. 632, Pt. II, 103d Cong., 2d Sess. 58 (1994) ("single sum distributions"). *See also* Pub. L. No. 103-465, § 767, 108 Stat. 4809 (1994) ("single sum distributions" and "cash-outs").

For example, the rules defining eligible rollover distributions under § 402 treat a social security level-income option as a "series of substantially equal periodic payments" and draw no distinction between a social security level-income option and a social security supplement. Treas. Reg. § 1.402(c)-2, Q&A-5(b).

Similarly, the proposed regulations under § 411(d)(6) treat two optional forms of benefit as "members of the same family of optional forms of benefit" if they are identical except with respect to "Social Security leveling features." Prop. Reg. § 1.411(d)-3(c)(3)(ii)(B). The proposed regulations thus treat an annuity with a social security level-income feature as equivalent to an otherwise identical annuity, not as equivalent to a lump sum.

In addition, the Pension Benefit Guaranty Corporation distinguishes benefits payable in the form of a social security level-income option (which the PBGC guarantees, just as it guarantees a straight life annuity beginning at normal retirement age) from lump-sum payments, installment payments, and other optional forms of benefit that the PBGC does not guarantee. PBGC Reg. § 4022.21(a)(2)(iii).

Moreover, expanding the optional forms of benefit that are covered by § 417(e) to include social security level-income options will weaken the defined benefit plan system:

- It will impose significant new financial obligations on plans that currently offer this option based on assumptions that are reasonable but different from those mandated by § 417(e).

- It will increase the Pension Benefit Guaranty Corporation's unfunded liabilities. (As explained earlier, the PBGC guarantees payment of social security level-income options, and will therefore be required to pay greater benefits on behalf of terminated plans that offer social security level-income options.)

- It will discourage plan sponsors from offering social security level-income options with respect to benefits accrued in the future -- thereby limiting the retirement income options available to plan participants.

- Because it will increase plan liabilities and complicate plan administration, it will give employers yet another reason to terminate, freeze, or otherwise curtail their defined benefit plans.

In sum, expanding the distribution options covered by § 417(e) to include social security level-income options would be contrary to both the text and legislative history of the statute, inconsistent with other Treasury regulations, and contrary to sound pension policy.

2. If, contrary to ERIC's recommendation, the Treasury is inclined to expand the distribution options covered by § 417(e) to include social security level-income options, the Treasury should first address this issue in a separate rulemaking in which the Treasury thoroughly and systematically considers the scope of § 417(e).

As explained in the preceding comment, ERIC believes that neither the statutory text nor sound pension policy supports applying § 417(e) to social security level-income options. However, if the Treasury is inclined to expand the class of distribution options covered by § 417(e) to include social security level-income options, the Treasury should first address this issue in a separate rulemaking in which the Treasury invites public comment on, and thoroughly and systematically considers, the scope of § 417(e). The Treasury should not quietly resolve the issue in a parenthetical phrase in regulations that address a different issue.

The proposed regulations are designed to address the effective date of the rules governing the disclosure of relative values and to clarify some of the related disclosure requirements. Whether an optional form of distribution is subject to § 417(e) is an entirely different subject. If the Treasury wishes to expand the forms of distribution that are subject to § 417(e), that issue should first be directly and openly considered in a separate rulemaking.

3. The Treasury should revise Treas. Reg. § 1.417(a)(3)-1(c)(1) to make it clear that, in the case of an annuity with a retroactive annuity starting date ("RASD"), the required participant-specific information may be determined as of the applicable RASD rather than as of a current date.

Treas. Reg. § 1.417(a)(3)-1(c)(1) states:

> "A QJSA explanation satisfies this paragraph (c) if it provides the following information with respect to each of the optional forms of benefit presently available to the participant **(i.e., optional forms of benefit with an annuity starting date for which the QJSA explanation applies)**--
>
> "(i) A description of the optional form of benefit;
>
> "(ii) A description of the eligibility conditions for the optional form of benefit;
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> "(iii) A description of the financial effect of electing the optional form of benefit (i.e., the amount payable under the form of benefit to the participant during the participant's lifetime and the amount payable after the death of the participant);
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> "(iv) In the case of a defined benefit plan, a description of the relative value of the optional form of benefit compared to the value of the QJSA, in the manner described in paragraph (c)(2) of this section; and

"(v) A description of any other material features of the optional form of benefit." (emphasis added).

Although the regulations are not as clear as they might be,[6] the parenthetical phrase in the introductory clause (emphasized above) indicates that the financial effect and relative value of a plan's optional forms of benefit may be determined as of the applicable annuity starting date -- including, where applicable, a RASD. Indeed, because the participant might have already elected a RASD before the participant-specific information is prepared, a participant is far more likely to be confused than helped if the plan furnishes the participant with financial effect and relative value information as of a date other than the RASD that the participant has elected.[7] Since the purpose of the regulations is to provide useful information to plan participants, an attenuated interpretation of the regulations that requires plans to provide potentially misleading and confusing information subverts the purpose of the regulations and is contrary to the interests of plan participants.

ERIC's view is supported by § 1.417(a)(3)-1(f), which provides that -- for purposes of the effective date provisions in subsection (f) -- in the case of a RASD, the actual commencement date is substituted for the annuity starting date.[8] The absence of a similar provision in § 1.417(a)(3)-1(c) strongly supports the view that the actual commencement date (or any other current date) is not required to be substituted for "annuity starting date" in § 1.417(a)(3)-1(c), regardless of whether the annuity starting date is prospective or retroactive.

The phrase "presently available to the participant," which also appears in the regulations' introductory clause, appears to refer to the optional forms of benefit that the participant may currently (or "presently") elect -- not to the date as of which the plan's optional forms of benefit are valued. This reading is supported by the syntax of the clause, since "presently available" immediately follows "the optional forms of benefit." It is also supported by common sense. If a participant elects a **prospective** annuity starting date, the

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[6] We understand that some IRS personnel interpret the regulations to require all optional forms to be valued as of a current date.

[7] When comparing optional forms beginning as of different annuity starting dates, the APV of such forms will be determined as of a single date. However, in some circumstances (*e.g.*, where the plan provides only annuity benefits and the periodic amount of the participant's annuity benefit as of the RASD is at least as great as it would be as of a prospective annuity starting date), the only optional forms that are presently available are paid as of a RASD. Furthermore, even when optional forms that are presently available may be paid as of either a RASD or a prospective annuity starting date, a plan might provide generally applicable information in compliance with § 1.417(a)(3)-1(d), and subsequently, in response to a participant's request, provide participant-specific information describing exclusively forms available as of a RASD.

[8] The proposed amendment to the effective date provisions in § 1.417(a)(3)-1(f) preserves this treatment of RASDs.

regulations permit the optional forms of benefit that a participant is presently entitled to elect to be valued as of the **prospective** annuity starting date rather than as of a current (or present) date. Because the regulations do not (and should not) distinguish between prospective and retroactive annuity starting dates, the rule should be the same in both cases: optional forms may be valued as of the applicable annuity starting date.[9]

4. The Treasury should revise Treas. Reg. § 1.417(a)(3)-1(c)(2)(iii)(C) to make it clear that "all options" refers to all of the optional forms of benefit with an actuarial present value ("APV") that meets the regulations' requirements and not to every optional form offered by the plan.

Treas. Reg. § 1.417(a)(3)-1(c)(2)(iii)(C) states:

> "If the plan is comparing the value of each optional form to the value of the QJSA for a married participant, this paragraph (c)(2)(iii)(C) provides a grouping rule that is in addition to the grouping rules of paragraph (c)(2)(iii)(A) of this section. Under this special rule, the relative value of **all optional forms of benefit that have an actuarial present value that is at least 95% of the actuarial present value of the QJSA for a married participant** is permitted to be described by stating that those optional forms of benefit are approximately equal in value to the QJSA, or that **all of those forms of benefit and the QJSA** are approximately equal in value. In addition, if a plan is comparing the value of optional forms of benefit to the value of the single life annuity and **all optional forms of benefit have actuarial present values that are at least 95%, but not greater than 102.5%, of the actuarial present value of the single life annuity**, the plan is permitted to describe the relative value of **all optional forms of benefit** by stating that **all the optional forms of benefit** are approximately equal in value, or that **all of those forms of benefit and the single life annuity** are approximately equal in value" (emphasis added).

The regulations appear to be inconsistent, ambiguous, or both. The second sentence quoted above (which refers to the APV of the QJSA for a married participant) clearly refers only to those optional forms that meet the applicable APV requirement. By contrast, the third (and final) quoted sentence (which refers to the APV of a single life annuity) seems ambiguous; the first part of the sentence seems to say that it applies only if "all" optional forms meet the applicable APV requirement, but the last part of the sentence suggests that it applies to "all of those forms of benefit" that have approximately the same

[9] If the financial effect of an optional form is explained by referring to the amount payable beginning on the RASD, the plan would, of course, disclose the fact that interest will be added to payments made after the scheduled payment date(s).

APV as the single life annuity.[10] Since the purpose of the regulations is to allow the grouping of the optional forms that have approximately the same APV, the regulations should allow the grouping of all of the optional forms that meet the applicable APV requirement and should **not** make grouping available only where **all** optional forms have approximately the same APV. The Treasury should revise the regulations to make their meaning clear.

The purpose of the regulations -- to provide understandable and useful information to plan participants -- is advanced by allowing a plan to use grouping where fewer than all of the plan's optional forms have approximately the same APV.

Grouping allows a plan to convey useful and readily understandable information to participants. It is easy for a participant to understand that that the optional forms that are grouped together have approximately the same APV, while the remaining optional forms, which are not included in the group, have different APVs.

It is far more difficult for a participant to assimilate a large volume of data that identifies the APV of each of the plan's numerous optional form of benefit without any grouping. Forbidding grouping will subvert the purpose of the regulations because it will require participants to assimilate information that is much more difficult to understand and use than the information that the plan could provide with the grouping approach.

5. The Treasury should make it clear that where a plan makes available one set of optional forms of benefit for one portion of a participant's accrued benefit (*e.g.*, benefits accrued before a specified date) and a different set of optional forms of benefit for the remainder of the participant's accrued benefit (*e.g.*, benefits accrued on and after the

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[10] The preamble to the final regulations is also inconsistent:

> "The final regulations permit a plan that is comparing the relative value of each optional form to the value of the QJSA for a married participant to treat each presently available optional form of benefit that has an actuarial present value of at least 95 percent of the actuarial present value of the QJSA as having approximately the same value as the QJSA. In addition, in the case of a plan that is comparing the relative value of each optional form to the value of the single life annuity, if all of the optional forms of benefit presently available have actuarial present values that are at least 95 percent, but not greater than 102.5 percent, of the actuarial present value of the presently available single life annuity, the plan is permitted to treat all the presently available forms of distribution as approximately equal in value."

68 Fed. Reg. 70,143 (Dec. 17, 2003).

specified date), the plan may disclose the financial effects and relative values of the optional forms separately for each portion of the participant's accrued benefit.

From time to time, employers commonly amend their defined benefit plans to change the optional forms of benefit (including the related actuarial assumptions) that the plans offer to participants. This happens for a variety of reasons, including corporate and plan mergers, changes in the composition of the employer's workforce, changes in employer or employee preferences, and changes in plan design or actuarial assumptions. When a plan's optional forms of benefit are changed, the anti-cutback rule in § 411(d)(6) generally requires the plan to preserve each participant's right to receive the participant's then-accrued benefit in any of the optional forms of benefit that the plan has offered before the optional forms are changed.

As a result, many plans make available different sets of optional forms of benefit for different portions of a participant's accrued benefit. In many of these cases, a participant's accrued benefit is bifurcated and covered by two different sets of optional forms of benefit; in others, the plan offers three (or more) different sets of optional forms.

In these circumstances, a plan should be permitted to disclose the financial effects and relative values of the optional forms separately with respect to each portion of the participant's accrued benefit.[11] The purpose of the disclosure requirement is to permit participants to make informed choices among the optional forms of benefit that the plan offers. If the plan offers, for example, two separate choices -- one with respect to benefits accrued before a specified date and another with respect to benefits accrued on and after that date -- the regulations' objective will be best served by presenting separately the information relevant to each choice.

Requiring the plan to combine all of the optional forms will increase exponentially the information that the plan provides and will overwhelm and confuse participants and their spouses, rather than help them to make informed decisions. For example, if ten optional forms apply to one portion of a participant's accrued benefit and six different optional forms apply to the remainder of the participant's accrued benefit, the plan would have to provide **sixty** relative value comparisons if the plan were required to present the information on a combined basis (as opposed to one set of nine comparisons and another set of five comparisons if the information could be provided separately with respect to each

[11] The current regulations permit a QJSA explanation to describe, at least initially, only generally available optional forms of benefit. Treas. Reg. § 1.417(a)(3)-1(d)(1). In the preamble to the original proposed relative value regulations, the Treasury explained that generally available optional forms of benefit may exclude "optional forms from prior benefit structures for limited groups of employees." 67 Fed. Reg. 62,417, 62,420 (Oct. 7, 2002). This simplification, however, is not available if different sets of optional forms are available to more than a limited group of employees or if a the participant requests more specific information. Accordingly, the Treasury should clarify how a plan describes different sets of optional forms in a single QJSA explanation.

portion of the participant's accrued benefit). In circumstances such as this, participants and their spouses will be overwhelmed and confused if the plan is required to provide them with sixty relative value comparisons.

This situation is analogous to a case where a participant is covered by two separate pension plans sponsored by the same employer. In the two-plan case, each plan is responsible for making a separate disclosure regarding the participant's optional forms of benefit under that plan. There is no reason to require a different form of disclosure where a single plan offers two different sets of optional forms of benefit -- each applicable to a different portion of the participant's accrued benefit. See also ¶ 6, below.

6. The Treasury should make it clear that where a plan permits a participant to elect different annuity starting dates for different portions of the participant's accrued benefit, and the participant is permitted to elect a different form of benefit for each portion of the participant's accrued benefit, the plan may disclose the financial effects and relative values separately for each portion of the participant's accrued benefit for which the participant is permitted to elect a separate annuity starting date.

This recommendation is consistent with the immediately preceding recommendation. Major employers' plans sometimes allow a participant to elect different annuity starting dates for different portions of the participant's accrued benefit. In these circumstances, it makes no sense to require the plan to present financial effect and relative value information with respect to the participant's total accrued benefit.

Separate disclosure regarding the applicable portion of the participant's accrued benefit is obviously appropriate where, under the terms of the plan, only a portion of the participant's accrued benefit is eligible for current payment and the remainder of the participant's accrued benefit cannot be paid until a later date. However, separate disclosure is equally appropriate where the participant elects to begin receiving only a portion of the participant's total accrued benefit currently and elects to defer commencement of the remainder of the accrued benefit under the plan. In these circumstances, the participant will be confused, rather than helped, by financial effect and relative value information regarding the participant's total accrued benefit: the only financial effect and relative value information that would be meaningful and helpful to the participant would be information regarding the portion of the participant's accrued benefit that the participant wishes to start receiving.

We appreciate the opportunity to submit these comments. If the Treasury has any questions about our comments, or if we can otherwise be of assistance, please let us know.

THE ERISA INDUSTRY COMMITTEE